NOS. 309 and 310

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA AND ASSOCIATED MUSICIANS OF GREATER NEW YORK LOCAL 802, ET AL.,

Petitioners,

v.

JOSEPH CARROLL, ET AL.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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This brief amicus curiae is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The opinions below, jurisdiction, questions presented, and the statutory provisions involved are set out on pp. 1-3 of the Musicians' brief.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of 129 national and international unions representing approximately fourteen million members. Following a basic tenet of trade union philosophy, *see e.g.* S. & B. Webb, Industrial Democracy 173-177 (London: Longmans, Green, 1902) Cox, *Labor and the Anti-Trust Laws,* 104 U. Pa. L. Rev. 252, 276 (1955), these organizations strive to eliminate wage competition among all those who perform the same job in the same industry. In many instances it is vital to this effort to regulate the minimum compensation received by employers and independent contractors who, because of the nature of their work, are in direct wage and job competition with employees. Thus the portion of the decision below adverse to the Union, which invalidated just such an effort, strikes a blow to the jugular not only of the Musicians but of many other unions as well. For this reason the AFL-CIO, as the spokesman for the majority of organized workers, wishes to take this opportunity to advise the Court of its views on this matter.[1]

SUMMARY OF ARGUMENT

1. In No. 309 the Court of Appeals held that the Muscians' regulations, which are designed to insure that all

[1] We will confine our remarks to the issues raised in No. 309 for two reasons. First, the general principles which govern that case appear to control the questions raised in No. 310. Second, the petition in No. 310 includes 27 Questions Presented, and some of these questions were not discussed in the body of the petition. Moreover, the Musicians argue that many of these questions either were not presented to the courts below or were not reached by them. Given the present confused state of No. 310 we have briefed only those matters that are clearly presented—the two questions raised in No. 309.

union members who perform musical services in the club date field receive the union scale, violate the Sherman Act. The union activity in question does not take the form of a combination between labor and non-labor groups through agreements or otherwise. It is confined to the internal union action of setting the scale and to concerted refusals to work, by union members, with those who undercut scale. This being so, the Court of Appeals' decision is erroneous since it is squarely in conflict with this Court's decisions in *United States* v. *Hutcheson,* 312 U.S. 219 (1941) and *Hunt* v. *Crumboch,* 325 U.S. 821 (1945). For *Hutcheson* and *Hunt* hold that no injunctions may issue, no damages may be assessed, no criminal penalty may be imposed, under the Anti-Trust Laws, if their effect is to interdict the use of economic weapons employed by a union in its self-interest during a labor dispute.

The Court of Appeals committed two fundamental errors which led to its conclusion that it was free not to follow *Hutcheson* and *Hunt.* First, it reasoned that the union activity here could not be said to grow out of a labor dispute even though designed to protect the wage standards of union member employees by regulating those who are in direct wage and job competition with those employees. This conclusion is directly contrary to this Court's decision in *Milk Wagon Drivers* v. *Lake Valley Farm Products,* 311 U.S. 91 (1940). Second, it concluded that the decisions in *Mine Workers* v. *Pennington,* 381 U.S. 657 (1965) and *Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676 (1965) were intended to ease the restrictions on anti-trust control of unilateral union activity during a labor dispute. This, too, was error for both *Pennington* and *Jewel Tea* dealt with combinations between labor and non-labor groups and *Pennington* specifically reaffirmed *Hutcheson.*

2. In reaching its decision the Court of Appeals relied on *Jewel Tea. Jewel Tea* is inapposite here because it dealt with a combination of labor and non labor groups. In any

event the Musicians' regulations are legal under the tests proposed in *Jewel Tea*. In that case the union argued that every provision in a collective bargaining agreement dealing with "wages, hours and other terms and conditions of employment" as that phrase has been interpreted by the National Labor Relations Board, should be entitled to the labor exemption to the Anti-Trust Laws. The union argued further the the NLRB should have primary jurisdiction in anti-trust cases that turn on the meaning to be given to wages, hours and working conditions. Mr. Justice White rejected both portions of the union's argument. He stated that the test in cases stripped of allegations of a union-employer conspiracy against other employers should be whether the provision has an immediate and direct effect on wages, hours and working conditions. If it does, it is to be accorded the labor exemption. Moreover, he made it clear that in applying this test the practical impact of the provision in question and not its form is decisive. He did not, we submit, counsel the lower courts to balance, according to their own predilictions, the legality of a union program which has an immediate and direct impact on its members labor conditions. Such an approach would, of course, run counter to basic legislative policies and to prior decisions of this Court and it would set the courts adrift in a trackless waste. Mr. Justice Goldberg, on the other hand, accepted the union argument that all mandatory subjects of bargaining are entitled to the labor exemption, while rejecting its primary jurisdiction argument.

The long-term effects of the differences between the opinions of Mr. Justice White and Mr. Justice Goldberg in *Jewel Tea* may well be substantial. However, the basic point, in the setting of the instant case, is that both concluded that certain combinations between unions and non-labor groups are entitled to the labor exemption, both recognized that a provision in a collective bargaining agreement which has a direct and immediate effect on

labor standards fits within that exemption and both recognized that a provision which parallels the agreement in *Local 24 Teamster* v. *Oliver*, 358 U.S. 283 (1959) is one which has such a direct and immediate effect.

In *Oliver*, the union sought to regulate the minimum compensation received by independent contractors who were in direct wage and job competition with employee union members, since they rendered essentially the same labor service. The situation confronting the Musicians here is precisely the same as that which confronted the union in *Oliver*. All those who perform musical services in the club date field, which includes the leader, the sub-leader and sidemen, are, on a number of levels, in direct job and wage competition with each other. And the Musicians' regulations found illegal by the court below are the direct minimum response to this situation compatible with the maintenance of the wage standards of its employee members. Since here, as in *Oliver*, the Union's activities have a direct and immediate impact on labor conditions they also are legal under *Jewel Tea*.

The argument thus far demonstrates that the Union's regulations here are concerned with [redacted] matter that falls within the scope of the mandatory subjects of bargaining. The Court of Appeals' decision to the contrary is, therefore, erroneous. Equally erroneous, is its conclusions that all provisions which are not mandatory subjects of bargaining are not entitled to the labor exemption. It is one thing to say that the NLRB should intercede to prevent a union from insisting on a particular provision. That, of course, is the effect of holding that a matter is a non-mandatory subject of bargaining. It is quite another thing to say that unions and employers should be subjected to anti-trust penalties if they voluntarily decide to work out their differences about a matter, which policy considerations that have nothing to do with the maintenance of a competitive economy, have been considered to remove

from the area of mandatory bargaining. The genius of collective bargaining is that it grows because of the efforts of such pioneers in labor relations. The decision of the Court of Appeals, if affirmed, would stultify the potential for such growth.

ARGUMENT

This Court's decisions in *Mine Workers v. Pennington*, 381 U.S. 657 (1965) and *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965) brought to light a number of serious and important questions about the full extent and overall nature of the labor exemption to the Anti-Trust Laws as it applies to agreements between a union and a non-labor group. In addition, *Pennington* and *Jewel Tea* appear to have created problems of another dimension as well. Both cases produced three opinions, each expressing the views of three Justices. And the portion of the Court of Appeals' decision which relates to the Union's efforts to regulate the minimum compensation of leaders in so-called club date musical engagements, and which is the basis of the appeal in No. 309, indicates that this plethora of opinions has produced a certain amount of confusion about heretofore well settled propositions concerning the labor exemption—propositions which stem from this Court's earlier decisions in *United States v. Hutcheson*, 312 U.S. 219 (1941); *Milk Wagon Drivers v. Lake Valley Farm Products*, 311 U.S. 91 (1940); *Hunt v. Crumboch*, 325 U.S. 821 (1945); and from *Local 24 Teamsters v. Oliver*, 358 U.S. 283 (1959). It is this latter aspect of the effect of *Pennington* and *Jewel Tea* that we believe to be of the essence here. For it is our position that the most rational reading of *Pennington* and *Jewel Tea* is that they were not intended to disturb the earlier correctly decided cases just noted, that those cases should be followed here, and that they require a decision in favor of the Musicians in the instant case. Our brief will be devoted to developing the reasons for this conclusion.

I

THE UNION ACTIVITY FOUND VIOLATIVE OF THE SHERMAN ACT IS LEGAL UNDER UNITED STATES v. HUTCHESON, 312 U.S. 219 (1941)

In No. 309 the Court of Appeals held that the Musicians' regulations, which are designed to insure that all union members who perform musical services in the club date field, receive the union scale, violate the Sherman Act, 26 Stat. 209 *et seq.*, 15 U.S.C. Sec. 1-2. The union activity in question does not take the form of agreements of any kind with the purchaser of the music (A. 153, 185).[2] It does not take the form of a combination between labor and non-labor groups. (A. 163-164, 194).[3] Rather, as the Court of Appeals stated, the union has restricted itself to "unilateral action" (A. 188). The unilateral action of the Union may be simply described. The Union by internal regulations sets a scale which governs the minimum compensation its members will ask in return for their musical services. Any union member who works below scale may be tried before a union tribunal and expelled from the Union. If he is expelled, union members will not work with him in the future. Thus, the union members have made a collective decision to refuse, on a concerted basis, to work with those who undercut their scale. In the final analysis then, all that is involved here is a unilaterally conceived and executed plan, by union members who have not combined with a non-labor group, to gain a legitimate end in a labor dispute through concerted refusals to work. This being so, reversal of the portion of the judgment below adverse to the Musicians is mandatory under prior decisions of this Court.

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[2] All "A" references are to the record Appendix printed for use in this court.

[3] The District Court developed at length the considerations that lead it to conclude that the leaders are a labor group. The Court of Appeals agreed with the District Courts conclusion, and the Musicians have briefed the issue fully. For that reason we do not discuss it here.

From *Loewe v. Lawlor*, 208 U.S. 274 (1908) to *United States v. Hutcheson, supra*, 312 U.S. 219, the Anti-Trust Laws were employed with a liberal hand to police union economic weapons used during labor disputes. *See* e.g. Berman, Labor and The Sherman Act (1930); Frankfurter & Green, The Labor Injunction (1930). *Hutcheson* signaled the end of this era by recognizing that Congress wished to remove refusals to work and the strike and the boycott, when employed in a labor dispute, from the regulatory ambit of the Anti-Trust Laws. Mr. Justice Frankfurter, speaking for the Court, put this conclusion in the following terms (312 U.S. at 231, 232):

> ". . . [W]hether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct.
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> "If the facts laid in the indictment come within the conduct enumerated in § 20 of the Clayton Act they do not constitute a crime within the general terms of the Sherman Law because of the explicit command of that section that such conduct shall not be 'considered or held to be violations of any law of the United States'. So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

The same point was recognized and emphasized by Mr. Justice Black, speaking for the Court, in *Hunt v. Crumboch, supra.*, 325 U.S. at 824, 825:

"It is not a violation of the Sherman Act for laborers in combination to refuse to work. They can sell or not sell their labor as they please, and upon such terms and conditions as they choose, without infringing the Anti-trust laws. Apex Hosiery Co. v. Leader, 310 US 469, 502, 503. A worker is privileged under congressional enactments, acting either alone or in concert with his fellow workers, to associate or to decline to associate with other workers, to accept, refuse to accept, or to terminate a relationship of employment, and to terminate a relationship of employment, and his labor is not to be treated as 'a commodity or article of commerce.'

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". . . [C]ongress in the Sherman Act and the legislation which followed it manifested no purpose to make any kind of refusal to accept personal employment a violation of the Anti-trust laws. Such an application of those laws would be a complete departure from their spirit and purpose."

In sum, where the gravamen of the offense charged or proved in a Sherman Act proceeding is that a union, acting alone, has made illegal use of the strike or the boycott or its other economic weapons in connection with a labor dispute, there is a complete failure, to use the words of Rule 12(b)(6) of the Rules of Federal Procedure, to state "a claim upon which relief may be granted". The judgment must, therefore, go for the union. For *Hutcheson* and *Hunt* hold that pursuant to Section 20 of the Clayton Act, 38 Stat. 738, 28 U.S.C. Sec. 52, and Section 4 of the Norris-La-Guardia Act, 47 Stat. 70, 29 U.S.C. Sec. 104, no injunction may issue, no damages may be assessed, no criminal penalty may be imposed, under the Anti-Trust Laws, if their effect

is to interdict the use of economic weapons employed by a union in its self-interest during a labor dispute.

The leading case involving a union defendant in which this Court has sustained the finding of an anti-trust violation, and which is the fountainhead of the courts' remaining anti-trust jurisdiction in this field, is completely consistent with our argument. In *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945), the Court held that a union which had *combined* with a non-labor group could be held to account under the Anti-Trust Laws. However the scope of the decision was limited by the statement that "the same labor union activities may or may not be in violation of the Sherman Act dependent upon whether the union acts alone or in combination with business groups." *Id.* at 810. And the Court's handling of the order entered below in *Allen Bradley*, makes it perfectly plain that the line it drew was based on the fact that the existence of a combination provided a proper predicate, which would otherwise be absent, for appropriate relief, a severence of the ties between the union and the employers—relief which would not require a contravention of Section 4 of Norris-LaGuardia or Section 20 of the Clayton Act. Thus Mr. Justice Black stated (*Id.* at 812):

> . . . [W]hen we turn to the sweeping commands of the injunction, we find that its terms, directed against the union and its agents alone, restrained the union, even though not acting in concert with the manufacturers, from doing the very things that the Clayton Act specifically permits unions to do.
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> "Respondents objected to the form of the injunction and specifically requested that it be amended so as to enjoin only those prohibited activities in which the union en-

> gaged in combination 'with any person, firm or corporation which is a non-labor group . . .' Without such a limitation, the injunction as issued runs directly counter to the Clayton and the Norris-LaGuardia Acts. The district court's refusal so to limit it was error."

The Court of Appeals committed two fundamental errors which led to its conclusion that it was free not to follow *Hutcheson* and *Hunt*. First, it reasoned (A. 195) that Union regulation of the leader's minimum compensation did not grow out of a labor dispute even though it recognized that the leaders were in direct wage and job competition with employee members of the Union and even though it recognized that the Union's regulations were designed to protect the wage standards of the employees. This conclusion is directly contrary to this Court's decision in *Milk Wagon Drivers v. Lake Valley Farm Products, supra,* 311 U.S. 91. There, the union, through picketing and other activities, sought to force independent milk vendors, whose inferior labor conditions were believed to enable them to undercut union standards, into the union in order to bring their conditions into line with those of its employee members. The Court held (*Id.* at 98-99):

> "Whether rightly or wrongly, the defendant union believed that the 'vendor system' was a scheme or device utilized for the purpose of escaping the payment of union wages and the assumption of working conditions commensurate with those imposed under union standards. To say, as the Circuit Court of Appeals did, that the conflict here is not a good faith labor issue, and that therefore there is no 'labor dispute,' is to ignore the statutory definition of the term; to say, further, that the conditioned abandonment of the vendor system, under the circumstances, was an issue unrelated to labor's efforts to improve working conditions, is to shut

one's eyes to the everyday elements of industrial strife."[4]

Second, and this is to some extent related to its first error, the Court Appeals concluded (A. 195-196) that the line between the permissibility of anti-trust control of combinations of labor and non-labor groups, in certain circumstances, and the impermissibility of such control over unilateral union activity during a labor dispute in all instances was erased by the opinion of Mr. Justice White in *Jewel Tea*. We submit that this is misreading of that opinion, and that *Pennington* and *Jewel Tea* read together indicate a conscious desire to maintain and emphasize the distinction we stress here. In *Pennington*, Mr. Justice White stated (381 U.S. at 661-662):

> "The antitrust laws do not bar the existence and operation of labor unions as such. Moreover, § 20 of the Clayton Act, 38 Stat 738, and § 4 of the Norris-LaGuardia Act, 47 Stat 70, permit a union, acting alone, to engage in the conduct therein specified without violating the Sherman Act. United States v. Hutcheson, 312 US 219.
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> "But neither § 20 nor § 4 expressly deals with arrangements or agreements between unions and employers. Neither section tells us whether any or all such arrangements or agreements are barred or permitted by the antitrust laws.
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> ". . . [I]n Allen Bradley Co. v. Union, 325 US 797, this Court made explicit what had been merely a qualifying

[4] In *Meat Drivers* v. *United States*, 371 U.S. 94 (1962) and *Columbia River Packers* v. *Hinton*, 315 U.S. 143 (1942) anti-trust violations were found on the ground that the independent contractors involved were not in wage and job competition with employees. This being so, there was no "labor dispute." But here there is such wage and job competition.

> expression in Hutcheson and held that 'when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts.' . . . Subsequent cases have applied the Allen Bradley doctrine to such combinations without regard to whether they found expression in a collective bargaining agreement. . . ."

Then in *Jewel Tea,* and building on the opinion in *Pennington,* Mr. Justice White noted (381 U.S. at 689):

> "The fact that the parties to the agreement are but a single employer and the unions representing its employees does not compel immunity for the agreement. We must consider the subject matter of the agreement in the light of the national labor policy. We pointed out in Pennington that exemption for union-employer *agreements* is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws." (emphasis added)

Thus, Mr. Justice White began by focusing on the necessity of proof of a combination between a labor and non-labor group as the predicate for a viable lawsuit charging that a union has violated the Anti-Trust Law. In his words, "a union acting alone [may] engage in the conduct specified in [Section 20 of the Clayton Act and Section 4 of Norris-LaGuardia] without violating the Sherman Act." In other words, if there is no allegation of, or proof of, such a combination the action must be dismissed. Mr. Justice White then went on to conclude that "agreements" including an agreement between a single employer and the union representing its employees may constitute the basis for a Sherman Act violation precisely because "neither Section 20 nor Section 4 tells us whether any or all such agreements [i.e.

agreements between a union and a non-labor group] are barred or permitted by the antitrust laws." For this reason a court may set aside such an agreement without running directly counter to the Clayton and Norris-LaGuardia Acts, in other words the action is viable because it is not beyond the power of the courts to enter appropriate relief.

In short, there is nothing in *Pennington* or *Jewel Tea* which is at variance with our analysis; the Court of Appeals, we submit, simply misread those decisions. Indeed, it is perfectly plain that there could not be a variance. For the line *Hutcheson* drew was based on the Congressional intent as embodied in the explicit language of Section 20 of the Clayton Act and Section 4 of Norris-LaGuardia. Nothing has happened in the interim to indicate that Congress has modified the policies ascribed to it in *Hutcheson* and there is no evidence to indicate that *Hutcheson* misread those statutes or their underlying history.

II

THE UNION ACTIVITY FOUND VIOLATIVE OF THE SHERMAN ACT IS LEGAL UNDER THE STANDARDS ENUNCIATED IN MEAT CUTTERS v. JEWEL TEA CO., 381 U.S. 676 (1965)

Since the District Court found that there was no combination with a non-labor group here and the Court of Appeals agreed with that conclusion (A. 163-164, 184), we have emphasized the argument that this case is controlled by *Hutcheson, Hunt,* and *Lake Valley.* For this reason as just noted, we submit that *Jewel Tea* is inapposite because it deals with the status under the labor exemption of a particular type of combination between labor and non-labor groups. The Court of Appeals thought otherwise and, relying on *Jewel Tea,* held that the Union regulations setting the minimum compensation of leaders, constituted "price

fixing" which is outside the labor exemption (A. 195-197).[5] In this portion of our argument we shall assume *arguendo* that *Jewel Tea* is applicable and we shall discuss the Court of Appeals reading of it because it is our judgment that the court below has seriously misread the import of that case.

Jewel Tea is best understood in light of the union's argument to the Court. That argument may be summarized as follows: Unions may use economic force to secure an agreement on the subjects encompassed under the heading "wages, hours and other terms and conditions of employment." *See National Labor Relations Board* v. *Wooster Division of Borg Warner Corp.*, 356 U.S. 342 (1958). Indeed, employers commit an unfair labor practice if they refuse to bargain about the matters which fall within Section 8(d) of the National Labor Relations Act, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.* Moreover, under the principles enunciated in *Hutcheson* and *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959) an employer

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[5] The Court of Appeals correctly noted that *Jewel Tea's* companion case, *Pennington*, has no application here. Thus *Jewel Tea* dealt with a combination achieved through a collective bargaining agreement between a union and an employer, which is the product of bargaining in which the union acts "not at the behest of any employer group but in pursuit of [its] own policies", 381 U.S. at 688. And in *Jewel Tea*, Mr. Justice White emphasized that *Pennington* was distinguishable from *Jewel Tea*, since the latter came to the Court "stripped of any claim of a union-employer conspiracy against Jewel," *Ibid.* That statement is true here too for the Court of Appeals stated (A. 195):

> "In the present case there is no evidence of a conspiracy between Local 802, or the Federation, and orchestra leaders to eliminate competitors, fix prices or achieve any other commercial restraint, nor was such a finding made by the district judge. Rather, the record establishes that all restraints were instituted unilaterally by the unions and acquiesced in by the orchestra leaders."

For this reason we do not discuss any of the serious problems raised by *Pennington*.

cannot enlist the aid of the Government, the National Labor Relations Board or the courts with the end in view of terminating, through the use of the injunction, or the threat of damages or of criminal penalties, a union's peaceful primary application of economic force. Unions are free to use their economic weapons because Congress has declared that "collective bargaining with the right to strike at its core is the essence of the Federal scheme" for achieving overall industrial peace, *Motor Coach Employees* v. *Missouri*, 374 U.S. 74, 82 (1963). Therefore, an agreement reached on these mandatory subjects of bargaining should enjoy the same status under the Anti-Trust Laws that the unilateral union conduct, which is the underlying basis for bringing the agreement into being, enjoys under *Hutcheson*. The union argued further that since the scope of Section 8(d) of the NLRA is the determining factor in the first instance, the NLRB and not the courts should have primary jurisdiction to decide whether a particular provision concerns wages, hours and working conditions.

This argument drew three responses from the Court. Mr. Justice White speaking for himself, the Chief Justice and Mr. Justice Brennan concluded that the marketing hour restriction under attack was exempt from the Anti-Trust Laws. However, he rejected the union's primary jurisdiction argument, 381 U.S. at 684-688 and he stated that his conclusion was not based "on the broad grounds urged by the union." *Id.* at 688. Instead, the test was to be as follows, (*Id.* at 689-690):

> "Thus the issue in this case is whether the marketing-hours restrictions, like wages, and unlike prices, is *so intimately related to wages, hours and working conditions* that the unions' successful attempt to obtain that provision through bona fide, arm's length bargaining in pursuit of their own labor union policies, and not at

behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.[6]

He applied this standard in the following terms (*Id.* at 691, 692):

> "Contrary to the Court of Appeals, we think that the particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain.
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> "And, although the effect on competition is apparent and real, perhaps more so than in the case of the wage agreement, *the concern of union members is immediate and direct.* Weighing the respective interests involved, we think the national labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work. An agreement on these subjects between the union and the employers in a bargaining unit is not illegal under the Sherman Act.[5]
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> [5] "The crucial determinant is not the form of the agreement—e.g., prices or wages—but its relative impact on the product market and the interests of union members.
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> "The unions argue further that since night operations would be impossible without night employment of butchers, or an impairment of the butchers' jurisdiction, or a substantial effect on the butchers' workload, the marketing-hours restriction is either little different in effect from the valid working-hours provi-

> sion that work shall stop at 6 p.m. or is necessary to protect other concerns of the union members. If the unions' factual premises are true, we think the unions could impose a restriction on night operations without violation of the Sherman Act; for then operating hours, like working hours, would constitute *a subject of immediate and legitimate concern* to *unions members.*" (footnote in the original, emphasis added)

The critical points in Mr. Justice White's analysis, as we read it, are: first, that the practical impact of the provision in question on wages, hours and working conditions and not its form is decisive; and second, that if the impact on wages, hours and terms and working conditions is "immediate and direct" the judicial inquiry is at an end and the provision is within the labor exempton. In other words, Mr. Justce White's opinion did not, we submit, counsel the lower courts to balance according to their own predilections or some ill defined non-statutory standard, the legality of a union program, which has an immediate and direct impact on its members' labor interests, against the impact of that program on the interests of employers, consumers, etc., even though that program also has an immediate and direct impact upon the latter.

We recognize that Mr. Justice White's opinion might be said to contain the implication that the courts may decide whether the direct benefits to employees of a provision are more or less important than the cost it entails to employers and consumers. However, we submit that there are very substantial, indeed overwhelming, considerations which militate against the adoption of that view. For such an approach would run directly counter to basic legislative policies. The history of judicial efforts under the Sherman Act to determine where the public interest in union organization and labor disputes lies, demonstrates the unsuitability of having the judiciary embark on that in-

quiry. Labor legislation from the Clayton Act through the Taft-Hartley Amendments to the NLRA has rejected the use of Anti-Trust Law as a means of resolving conflicts between the self-interest of employees, on the one hand, and of employers and consumers, on the other, as long as the employees are not seeking to advance their interests merely by providing a sheltered product market and thus conferring monopolistic power upon their employers. Both Norris-LaGuardia and the NLRA also rejected judicial appraisal of the justification for employees' concerted action. *See Hutcheson,* 312 U.S. at 232; *International Union; UAW* v. *Wisconsin Board,* 336 U.S. 245, 257-258 (1949). It would, therefore, be inconsistent with the trend of Congressional action and of this Court's prior decisions to allow judicial evaluation of the importance of the direct benefits for employees obtained from a collective agreement as compared to the costs of the restriction upon others. Moreover, the quotation from *Jewel Tea* set out above, pp. 17-18, *supra,* accentuates the point that in applying the standard he proposed, Mr. Justice White eschewed the approach which would set the courts adrift in such a trackless waste.

The law prior to *Pennington* and *Jewel Tea* recognized two basic types of restraints on competition that might come about from union activity—those that flow from programs which have a direct impact on the labor market. *see, Apex Hosiery Co. v. Leader,* 310 U.S. 469, 503 (1940),[6] and those that flow from programs which have a direct impact on the product market and from which workers get "nothing more concrete than a hope of

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[6] "Since, the order to render a labor combination effective it must eliminate the competition from non-union made goods, see American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209, an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act."

better wages to come'' *Pennington,* 381 U.S. at 663, *see also Allen Bradley,* 325 U.S. at 811. We submit that the most logical reading of the test proposed by Mr. Justice White in *Jewel Tea* is that it is a synthesis of the insights in *Apex* and *Allen Bradley*—a synthesis which provides that only agreements which have a direct impact on the product market and an indirect and speculatative impact on wages, hours and working conditions are outside the labor exemption. Naturally, of course, as *Jewel Tea* indicates, this approach does not *per se* immunize classes of agreements from the Anti-Trust Laws. In many instances, as here, a detailed investigation of the facts will be necessary to measure the impact of the restrictions. But it does alleviate the possibility that the courts will be left at large in this delicate area.

Mr. Justice Goldberg speaking for himself, Mr. Justice Stewart and Mr. Justice Harlan, concurred in the Court's order validating the marketing hour restriction in *Jewel Tea,* and concurred also in Mr. Justice White's rejection of the union's primary jurisdiction argument, 381 U.S. at 710, n. 18. He, however, was of the view that all agreements on mandatory subjects of bargaining were entitled to the labor exemption. He stated (*Id.* at 710):

> "Following the sound analysis of Hutcheson, the Court should hold that, in order to effectuate congressional intent, collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws. This rule flows directly from the Hutcheson holding that a union acting as a union, in the interests of its members, and not acting to fix prices or allocate markets in aid of an employer conspiracy to accomplish these objects, with only indirect union benefits, is not subject to challenge under the antitrust laws. To hold that mandatory collective bargaining is completely protected

> would effectuate the congressional policies of encouraging free collective bargaining, subject only to specific restrictions contained in the labor laws, and of limiting judicial intervention in labor matters via the antitrust route—an intervention which necessarily under the Sherman Act places on judges and juries the determination of 'what public policy in regard to the industrial struggle demands.' Duplex Co. v. Deering, supra, 254 US at 485."

In the setting of the instant case, the critical fact to note about Mr. Justice Goldberg's opinion, it seems to us, is that he agreed with Mr. Justice White that it is for the courts in the first instance, and not the NLRB, to decide whether a provision in an agreement is within the labor exemption. This would not be a matter of moment if it were always apparent whether a provision in question is encompassed by the concept "wages, hours and other terms and conditions of employment" as that phrase in Section 8(d) has been interpreted. But the application of Section 8(d) to particular situations is not a simple mechanical process. Terms and conditions of employment do not always define themselves. There are some matters, which are bargained about, that may be outside their scope. Thus, even Mr. Justice Goldberg's decision requires the courts to look for an interpretive guideline. And up to a point, *within which this case falls,* the basic interpretive guideline developed under Section 8(d) to indicate whether a particular matter is a mandatory subject of bargaining overlaps that suggested by Mr. Justice White in *Jewel Tea.*

The latest expression of this Court as to the meaning of Section 8(d) is *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U.S. 203 (1964). In that case, the employer contracted out work because of economies

which were based on the inferior wage standards of the employees who received the work. In holding that such contracting out is a mandatory subject of bargaining, the Chief Justice, speaking for the Court, stated (*Id.* at 212-213):

> "The situation here is not unlike that presented in Local 24, Teamsters Union v Oliver, 358 US 283, where we held that conditions imposed upon contracting out work to prevent possibl curtailment of jobs and the undermining of conditions of employment for members of the bargaining unit constituted a statutory subject of collective bargaining. . . . "We held that the agreement was upon a subject matter as to which federal law directed the parties to bargain and hence that state antitrust laws could not be applied to prevent the effectuation of the agreement. We pointed out that the agreement was a 'direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract. . . .'
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> "Thus, we concluded that such a matter is a subject of mandatory bargaining under § 8(d). Id. 358 US at 294-295. The only difference between that case and the one at hand is that the work of the employees in the bargaining unit was let out piecemeal in Oliver, whereas here the work of the entire unit has been contracted out."

Thus, a basic component of the Court's approach in *Fibreboard* was to determine whether the provision in question was addressed to the regulation of a matter that directly affected the wage standards and other working conditions of employees. That, too, is the essence of Mr. Justice White's approach in *Jewel Tea*. Indeed, Mr. Justice White,

likewise, relied heavily on *Local 24 Teamsters v Oliver, supra.*, 358 U.S. 283, *see* 381 U.S. at 690, n. 5.[7]

We do not seek to minimize the importance of the differences between the opinions of Mr. Justice White and Mr. Justice Goldberg, or the important long-term effect of those differences. They may well be substantial, especially on the question of the extent to which the courts should plumb the underlying motives of the parties in order to determine whether or not the agreement in question is "bona fide" as that term is used by Mr. Justice White in *Jewel Tea* or whether it is the product of an anti-competitive program; on the question of type and quantum of evidence that is necessary to prove a *Pennington* type case; and on the question of the full scope of the labor exception for bona fide collective bargaining agreements. But this is not the occasion for the resolution of those questions. For the point here, we submit, is that both Mr. Justice Goldberg and Mr. Justice White concluded that certain combinations between unions and non-labor groups are entitled to the labor exemption, both recognized that a provision in a collective bargaining agreement which has a direct and immediate effect on labor standards fits within that exemption, and both recognized that a provision which parallels the agree-

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[7] Mr. Justice Douglas, speaking for himself, Mr. Justice Black and Mr. Justice Clark, did not, as we read his opinion, reach the question of the status of agreements which are the product of union action which is not taken at the behest of an employer group, but in pursuit of its own policies. He analyzed *Jewel Tea* as a case in which the union, acting in concert with some employers with whom it dealt, sought to restrict competition in the product market, not to insure a direct benefit to butchers, but to disadvantage those employers who could sell meat after 6 p.m. without employing butchers. In other words, Mr. Justice Douglas, taking issue with the fact findings of the district court there, believed that as in *Allen Bradley*, the retraint on the product market was direct and that no direct labor benefit had been shown, *see* 381 U.S. at 735-738. Since there is no employer-union conspiracy here, we have not discussed the implications of his opinion. *See* p. 15 n. 5 *supra*.

ment in *Oliver* is one which has such a direct and immediate effect. There can be no doubt that the union's regulations here parallel the agreement in *Oliver*, and are a response to the same problem. The Court of Appeals' failure to appreciate this point is at the root of its error.[8]

In *Oliver*, as here, the union sought to regulate the minimum compensation received by independent contractors, who were in direct job and wage competition with employee union members since they rendered essentially the same labor service. This Court approved that union program stating (358 U.S. at 294-295):

> "The inadequacy of a rental which means that the owner makes up his excess costs from his driver's wages not only clearly bears a close relation to labor's efforts to improve working conditions but is in fact of vital concern to the carrier's employed drivers; an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service. Cf. Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters v. Whol. 315 U.S. 769. It is not necessary to attempt to set precise outside limits to the subject matter properly included within the scope of mandatory collective bargaining, cf. National Labor Relations Board v. Wooster Division of Borg-Warner Corp., 356 U.S. 342, to hold, as we do, that the obligation under § 8(d) on the carriers and their employees to bargain collectively 'with respect to wages, hours, and other terms and conditions of employment' and to embody their understanding in 'a written contract incorporating any agreement reached,' found an expression in the subject matter of Article XXXII."

[8] The analytical infirmities in the Court of Appeals attempt to deal with *Oliver* are discussed fully in the Musicians brief.

The leader in the club date field furnishes one or a number of musical services, playing an instrument, conducting, selecting the sidemen, etc.[9] that are identical to the functions performed by employee musicians (A. 130-132, 163-164). Moreover, in club date engagements the leader is normally not a full-time leader but a musician who works also as a sub-leader or sideman in that field, and as an employee musician in other fields of the music industry (A. 33). Finally, in the club date field the marginal cost of the service is equal to the performers' compensation; it does not include a component attributable to capital investment. In short, all those who perform musical services in the club date field are, on a number of levels, in direct job and wage competition with each other.

The Musicians' regulations, found illegal by the court below, are the direct minimum response to this situation compatible with the maintenance of the wage standards of its employee members. It is true that this response is stated in terms of a minimum "price" to be charged, but as *Oliver* teaches, that is not determinative. When independent contractors compete with employees, attempts to maintain the standards of the latter, by regulating the former, must prescribe the minimum total compensation received by the independent contractor. For where, as here, the leader's mini-

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[9] As Judge Friendly, dissenting below noted (A. 205):

> "I fail to see why protecting the member who wants to make an extra charge of 25% when he assumes the additional burden of getting an engagement against being undercut by others willing to forgo it is not as legitimate a union objective as setting a differential for a sideman's playing more than one instrument or engaging in rehearsal. As the size of the band increases, the time and cost of obtaining engagements, picking the sidemen, and making sure they are on hand at the appointed time and place also grow. If the union wants to see that such services are compensated rather than have some members perform them without remuneration for their time, effort or out-of-pocket expenses, this objective does not cease to be 'intimately connected with wages, hours and working conditions' . . ."

mum charge equals the total minimum wages of the sidemen plus the leader's minimum fee only two results can follow if the total price he charges is less than scale. First, that he has taken less than scale for his services, or second, that his sidemen are getting less than scale for their services. Either way there is a direct and immediate downward pressure on the scale of employee members of the union. Thus the effect of the Musicians' regulations is exactly the same as the effect of a contract between a union and an industrial employer in which it is provided that the agreed upon wage for each week is due and owing before work begins for that week and that if it is not paid the men will not work. Both are simply devices to insure that employees are paid scale. The superficial difference between the two is that the Musicians' regulation appears to look toward the product market while the latter type of provision clearly looks to the labor market. But once the rationale for the Musicians' regulation is plumbed, it is plain that the effect of both is the same; both have a direct and immediate impact on the labor market. Both are thus legal under *Jewel Tea.*

What we have said thus far demonstrates that the Musicians' regulation of the leaders' minimum compensation relates to a mandatory subject of bargaining for the same reason that the provision in *Oliver* was a mandatory subject of bargaining and that the dispute in *Fibreboard* related to a mandatory subject of bargaining. Indeed, the Board has specifically recognized that regulations which limit competition for jobs between employees and representatives of management are a mandatory subject of bargaining, *see Crown Coach Corp.*, 155 NLRB 625, 628 (1965). Thus, there should be no occasion here to pass on the Court of Appeals' erroneous conclusion that if a particular provision is a non-mandatory subject of bargaining it can never be entitled to the labor exemption (A. 197). Neverthe-

less, in order to afford the Court an overall picture of the problem we will deal briefly with that aspect of the decision of the court below.

If it were absolutely plain that every provision which has a direct and immediate impact on the labor standards of employees was recognized as a mandatory subject of bargaining, it might well be that the Court of Appeals' conclusion that non-mandatory subjects of bargaining are not within the labor exemption would be acceptable. Moreover we do believe that every such provision should be considered a mandatory subject and we submit further that there is not a single decision of this Court which takes a contrary view. However, we recognize that Mr. Justice Stewart's concurring opinion in *Fibreboard* indicates that three members of this Court may take the position that a provision which has a direct effect on labor conditions but also "lies at the core of entrepreneurial control", should not be considered a mandatory subject of bargaining, 379 U.S. at 224. We recognize also that this Court, while stressing the point that it is not "determinative", has looked to "industrial practices in this country" in Section 8(d) cases, *Fibreboard*, 379 U.S. at 211. This may indicate that the rule of decision in interpreting Section 8(d) may some day take a form that would provide that a provision with a direct effect on labor conditions may or may not be a mandatory subject of bargaining depending on the degree of interest the question has aroused among union members generally. But surely these considerations, neither of which go to the maintenance of a competitive economy, should not govern in the anti-trust area.

The question in Section 8(d) cases has always been considered to be whether the parties should be required by Government fiat to bargain about a particular matter. The decision that they should not leads only to the conclusion that the NLRB is to be afforded remedial powers to insure that the parties do not insist on a non-mandatory

subject to impasse. In the anti-trust field the question is whether the parties will be allowed to agree about a particular matter. And anti-trust regulation puts the availability of criminal and treble damage relief into the hands of private parties not simply into the hands of publicly selected, basically impartial, experts in labor relations. The difference in the questions asked, and the modes of relief available, suggest that the conclusion reached in one area is not determinative in the other. It is one thing to say that the NLRB should intercede to prevent a union from insisting on a particular provision, but it is quite another to say that unions and employers should be subjected to anti-trust penalties if they voluntarily decide to work out their differences about a matter as to which the labor laws leave them free not to bargain. The genius of collective bargaining is that it grows because of the efforts of such pioneers in labor relations. For just these reasons *Wooster Division of Borg-Warner,* sets up three categories of bargaining subjects—mandatory, permissive and illegal *see* 356 U.S. at 349. The Court of Appeals' analysis will inevitably tend to truncate this tripartite scheme into two categories—mandatory and illegal. For it is only natural to expect that parties who are unsure whether they wish to bargain about a matter which is not clearly mandatory will plead potential liability under the Anti-Trust Laws as an excuse. The net effect may be to restrict the creative growth of collective bargain. This was not the intent of *Wooster Division of Borg-Warner.* It is directly contrary to the intent of the NLRA which is to "promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation." *Fibreboard,* 379 U.S. at 211.

Finally, there is nothing in Mr. Justice White's opinion in *Jewel Tea* to indicate that this is not an open question. The critical passage is (381 U.S. at 689):

> "Employers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects. But neither party need commits an unfair labor practice if it conditions its bargaining upon discussions of a nonmandatory subject. Labor Board v. Borg-Warner Corp. 356 U.S. 342. Jewel, for example, need not have bargained about or agreed to a schedule of prices at which its meat would be sold and the unions could not legally have insisted that it do so. But if the unions had made such a demand, Jewel had agreed and the United States or an injured party had challenged the agreement under the antitrust laws, we seriously doubt that neither the unions or Jewel could claim immunity by reason of the labor exemption, whatever substantive questions of violation there might be."

To us this means that a provision regarding a non-mandatory subject of bargaining that has only an indirect effect on labor conditions is not within the labor exemption. It does not speak to the broader issues raised by the Court of Appeals. Indeed the basic thrust of Mr. Justice White's approach is that decisions under Section 8(d) should not be the determinative factor under the Anti-Trust Laws.

CONCLUSION

For the above-stated reasons, as well as those presented by the Union, the judgment of the Court of Appeals should be reversed with directions to reinstate the judgment of the District Court dismissing the complaint.

Respectfully submitted,

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